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Joe bin Stephen & Anor v Public Prosecutor

B HIGH COURT (SHAH ALAM) — CRIMINAL APPEAL NO BA-42S(A)-4–02 OF 2017
AHMAD FAIRUZ JC
24 DECEMBER 2018

C *Criminal Law — Appeal — Appeal against conviction and sentence — Corruption — Sessions court judge convicted and sentenced appellant — Appellant appealed against conviction and sentence — Whether prosecution proved prima facie case — Whether defence raised doubt to prosecution case — Whether prosecution failed to prove common intention under s 34 of the Penal* D *Code — Whether trial judge failed to rebut presumption under s 50 of the MACC Act — Malaysian Anti-Corruption Act 2009 s 17(a)*

Evidence — Adverse inference — Failure to call witness — Prosecution failed to E *call witness — Whether s 114(g) of the Evidence Act 1950 should be invoked against prosecution — Evidence Act 1950 s 114(g)*

Mohd Farid bin Che Aziz ('the appellant') was found guilty together with Joe bin Stephen ('the first accused') of attempting to obtain RM6,000 from an F individual under s 17(a) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act') by the Shah Alam Sessions Court. The trial judge sentenced the first accused and the appellant to two years imprisonment. In addition, they were each ordered to pay a fine of RM30,000. Dissatisfied with the decision of the learned trial judge, the appellant filed the present appeal. G The first accused did not appeal and went on to serve sentence. It was established from the evidence adduced that in the early hours of 3 April 2012, Low Kok Leong ('SP2') and Lee Yong Hock ('SP4') who were both in a Nissan Sentra was stopped by the first accused and the appellant who were at that time in a Proton Waja. After effecting arrest on SP2 and SP4, checks were carried out H which showed SP4 was a person on the police 'wanted list'. SP2 and SP4 together with the Sentra were then brought to the Pandamaran Police Station. The first accused had demanded from SP4 RM20,000 for his release. SP4 was unable to accede to the demand but said that he needed to contact a friend to help out. The sum was negotiated down to RM6,000. SP4 then was told by his I uncle that he was unable to pay RM6,000 as agreed but could only pay RM3,000. RM3,000 was subsequently deposited into SP4's account via online banking. The first accused and the appellant brought SP2 and SP4 to several ATM machines at various banks including the ATM machine at the Public Bank located not far from the Pandamaran Station. SP4 was asked to bank in

the remainder of the RM3,000 into the first accused's account. The first accused gave his account number to SP4 for purposes of depositing the said monies. After failing to raise the said monies, SP4 decided to lodge a report with the Malaysian Anti-Corruption Commission ('MACC') at the Klang Branch. On 26 April 2012, the Sentra car was seized from SP11. On the same date, the first accused and the appellant was asked to go to the MACC office in Klang. The first accused was arrested on 11 August 2012 while the appellant was arrested on 12 August 2012. At the material time, the first accused and the appellant were police personnel attached to the Pandamaran Police Station and the Criminal Investigation Department respectively. In the present appeal, there were four main issues were raised by the appellant; (a) whether there was a failure of the trial judge to fully evaluate the appellant's defence; (b) whether there was a failure by prosecution to prove common intention under s 34 of the Penal Code; (c) whether there was a failure of the trial judge to rule that the presumption under s 50 of the MACC Act had been rebutted; and (d) whether there was a failure of the trial judge to invoke s 114 illustration (g) of the Evidence Act 1950.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The court was of the view that the prosecution had proven all elements of the charge which included: (a) that the appellant was at the material time a public officer attached with the Royal Malaysia Police; (b) the appellant as agent attempted to obtain gratification of RM6,000 from SP4; (c) the appellant attempted to obtain the gratification corruptly; and (d) the appellant attempted to obtain the gratification for doing an act in relation to his principal's affairs in this particular case, to not take action against SP4 as a person wanted by the police and SP4 being in possession of an unregistered car. It was found that a prima facie case was established (see paras 31–35 & 42).

(2) SP2 and SP4 were consistent in their account of the events that unfolded the said morning. The evidence given by the two main prosecution witnesses remained intact throughout the trial despite the rigorous cross-examination. The evidence given showed a clear test of their recollection and the court found that there was no difficulty in making a finding that their credibility remained intact and unscathed (see para 39).

(3) In assessing the defence of the appellant, it was found that the trial judge did not err in finding that the defence failed to raise any doubt. The trial judge had meticulously sieved through the evidence and compared the strength of the defence with the prosecution evidence (see para 44).

(4) It was difficult for the court to find any evidence put forward by the appellant to rebut the presumption. It was in evidence that the appellant was at all material times together with the first accused as well as during discussions regarding payment of monies between SP4 and his uncle. The

prosecution evidence also showed that there were monies being withdrawn from the CIMB Bank automated teller machine. The time in which the monies were withdrawn coincided with the time when both SP2 and SP4 were under the custody of the first accused and the appellant. It was on the strength of the evidence of the prosecution that the court found that that the appellant had failed to rebut the statutory presumption. There was corrupt intention by both the first accused and the appellant (see paras 55–57).

(5) What was crucial for s 34 to be proven was whether there was participation by the appellant which culminated in criminal act which was related to the attempt to obtain the RM6,000. There was clear participation by the appellant together with the first accused that could readily infer common intention between them. There was nothing that could be shown by the appellant that he took any steps to report or escalate the issue further to his superiors. The failure to do all the basic actions pointed conclusively to the appellant was a party to the criminal enterprise. The court found that common intention was clearly present between the first accused and the appellant at all material times (see paras 62–65).

(6) Failure to call the uncle of SP4 did not at any time result in any gap to the prosecution case. The uncle was not a material witness to prove the act of attempting to obtain the said monies. Although there was a conversation with the said uncle, the rest of the events that unfolded between the first accused, the appellant and the two main witnesses had sufficiently unfolded the narrative of the prosecution case. There were no unsatisfactory gaps in the prosecution case. There was no oblique motive on the part of the prosecution for not calling the said uncle. Even without his evidence, it was shown how the first accused and the appellant went about in attempting to obtain the said RM6,000. As such, there was no basis to invoke s 114(g) against the prosecution (see paras 68–69).

[Bahasa Malaysia summary

Mohd Farid bin Che Aziz ('perayu') didapati bersalah bersama Joe bin Stephen ('tertuduh pertama') bagi cubaan mendapatkan RM6,000 daripada individu di bawah s 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 ('Akta SPRM') oleh Mahkamah Sesyen Shah Alam. Hakim bicara menjatuhkan tertuduh pertama dan perayu dengan dua tahun penjara. Di samping itu, mereka masing-masing diperintahkan membayar denda sebanyak RM30,000. Tidak berpuas hati dengan keputusan hakim bicara yang bijaksana, perayu memfailkan rayuan ini. Tertuduh pertama tidak merayu dan terus menjalani hukuman. Adalah ditetapkan dari keterangan yang dikemukakan bahawa pada awal pagi 3 April 2012, Low Kok Leong ('SP2') dan Lee Yong Hock ('SP4') yang kedua-duanya di dalam sebuah Nissan Sentra telah dihentikan oleh tertuduh pertama dan perayu yang ketika itu berada di Proton Waja. Selepas

melakukan penangkapan pada SP2 dan SP4, pemeriksaan dijalankan yang menunjukkan SP4 adalah seorang yang berada dalam senarai yang dikehendaki polis. SP2 dan SP4 bersama-sama dengan Sentra tersebut kemudian dibawa ke Balai Polis Pandamaran. Tertuduh pertama telah menuntut daripada SP4 RM20,000 untuk pembebasannya. SP4 tidak dapat memenuhi tuntutan tetapi berkata bahawa dia perlu menghubungi rakan untuk membantu. Jumlah itu dirundingkan sehingga RM6,000. SP4 kemudian diberitahu oleh bapa saudaranya bahawa dia tidak dapat membayar RM6,000 seperti yang dipersetujui tetapi hanya boleh membayar RM3,000. RM3,000 kemudiannya dimasukkan ke dalam akaun SP4 melalui perbankan dalam talian. Tertuduh pertama dan perayu membawa SP2 dan SP4 ke beberapa mesin ATM di pelbagai bank termasuk mesin ATM di Public Bank yang terletak tidak jauh dari Stesen Pandamaran. SP4 diminta untuk memasukkan baki RM3,000 ke dalam akaun tertuduh pertama. Tertuduh pertama memberikan nombor akaunnya kepada SP4 untuk tujuan mendepositkan wang tersebut. Selepas gagal mengumpulkan wang tersebut, SP4 memutuskan untuk membuat laporan dengan Suruhanjaya Pencegahan Rasuah Malaysia (SPRM) di Cawangan Klang. Pada 26 April 2012, kereta Sentra telah dirampas daripada SP11. Pada tarikh yang sama, tertuduh pertama dan perayu diminta pergi ke pejabat SPRM di Klang. Tertuduh pertama ditangkap pada 11 Ogos 2012 manakala perayu ditangkap pada 12 Ogos 2012. Pada masa yang material, tertuduh pertama dan perayu adalah masing-masing anggota polis yang bertugas di Balai Polis Pandamaran dan Jabatan Siasatan Jenayah. Dalam rayuan ini, terdapat empat isu utama yang dibangkitkan oleh perayu; (a) sama ada terdapat kegagalan hakim bicara untuk menilai sepenuhnya pembelaan perayu; (b) sama ada terdapat kegagalan oleh pendakwaan untuk membuktikan niat bersama di bawah s 34 Kanun Keseksaan; (c) sama ada terdapat kegagalan hakim bicara untuk memutuskan bahawa anggapan di bawah s 50 Akta SPRM telah dibantah; dan (d) sama ada terdapat kegagalan hakim bicara untuk membangkitkan s 114 ilustrasi (g) Akta Keterangan 1950.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Mahkamah berpendapat bahawa pihak pendakwaan telah membuktikan semua elemen pertuduhan yang termasuk: (a) bahawa perayu berada pada masa yang material seorang pegawai awam yang bersama dengan Polis Diraja Malaysia; (b) perayu sebagai ejen cuba mendapatkan suapan sebanyak RM6,000 dari SP4; (c) perayu cuba mendapatkan suapan secara rasuah; dan (d) perayu cuba mendapatkan suapan untuk melakukan perbuatan berhubung dengan urusan prinsipalnya dalam kes tertentu, untuk tidak mengambil tindakan terhadap SP4 sebagai orang yang diinginkan oleh polis dan SP4 sedang memiliki kereta yang tidak terdaftar. Adalah didapati bahawa kes prima facie telah ditubuhkan (lihat perenggan 31–35 & 42).

(2) SP2 dan SP4 adalah konsisten dalam cerita mereka mengenai peristiwa-peristiwa yang berlaku pada pagi tersebut. Keterangan yang diberikan oleh dua saksi utama pendakwaan kekal sepanjang perbicaraan walaupun pemeriksaan balas yang dahsyat. Keterangan yang diberikan menunjukkan ujian yang jelas mengenai ingatan mereka dan mahkamah mendapati bahawa tidak ada kesukaran untuk membuat penemuan bahawa kredibiliti mereka kekal dan tidak terjejas (lihat perenggan 39).

(3) Dalam menilai pembelaan perayu, adalah didapati bahawa hakim bicara tidak terkhilaf apabila mendapati pembelaan gagal menimbulkan keraguan. Hakim bicara dengan teliti telah menyaring keterangan dan membandingkan kekuatan pertahanan dengan keterangan pendakwaan (lihat perenggan 44).

(4) Adalah sukar bagi mahkamah untuk mencari apa-apa keterangan yang dikemukakan oleh perayu untuk menolak anggapan tersebut. Ia adalah dalam keterangan bahawa perayu berada di semua masa material bersama-sama tertuduh pertama serta ketika perbincangan mengenai pembayaran wang antara SP4 dan bapa saudaranya. Keterangan pendakwaan juga menunjukkan bahawa terdapat wang yang dikeluarkan dari mesin pengeluaran wang automatik CIMB Bank. Masa di mana wang dikeluarkan bersamaan dengan masa apabila kedua-dua SP2 dan SP4 berada di bawah jagaan tertuduh pertama dan perayu. Ia adalah pada kekuatan keterangan pendakwaan bahawa mahkamah mendapati bahawa perayu telah gagal menolak andaian statutori itu. Terdapat niat rasuah oleh kedua-dua tertuduh pertama dan perayu (lihat perenggan 55–57).

(5) Apa yang penting bagi s 34 untuk dibuktikan adalah sama ada terdapat penyertaan oleh perayu yang menyebabkan dalam perbuatan jenayah yang berkaitan dengan percubaan untuk memperoleh RM6,000 tersebut. Terdapat penyertaan yang jelas oleh perayu bersama-sama dengan tertuduh pertama yang boleh dengan mudah menyimpulkan niat bersama di antara mereka. Tiada apa-apa yang boleh ditunjukkan oleh perayu bahawa dia mengambil sebarang langkah untuk melaporkan atau menaikkan isu tersebut kepada atasannya. Kegagalan untuk melakukan semua tindakan asas menunjukkan secara mendalam kepada perayu adalah pihak kepada perlakuan jenayah. Mahkamah mendapati bahawa niat bersama jelas terdapat antara tertuduh pertama dan perayu pada semua masa yang material (lihat perenggan 62–65).

(6) Kegagalan untuk memanggil bapa saudara SP4 tidak pada bila-bila masa menyebabkan sebarang jurang kepada kes pendakwaan. Bapa saudara tersebut bukan saksi material untuk membuktikan perbuatan cuba mendapatkan wang tersebut. Walaupun terdapat perbualan dengan bapa saudara tersebut, peristiwa seterusnya yang berlaku antara tertuduh pertama, perayu dan dua saksi utama cukup menceritakan kisah kes

pendakwaan. Tiada jurang yang tidak memuaskan dalam kes pendakwaan. Tiada motif serong pada pihak pendakwaan kerana tidak memanggil bapa saudara tersebut. Walaupun tanpa keterangan beliau, ia menunjukkan bagaimana tertuduh pertama dan perayu pergi dalam cubaan untuk memperoleh RM6,000 tersebut. Oleh itu, tiada asas untuk memohon s 114(g) terhadap pendakwaan (lihat perenggan 68–69).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

For cases on failure to call witness, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 470–506.

Cases referred to

(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v PP [1987] 2 MLJ 336, SC (folld)

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613, FC (refd)

Attan bin Abdul Gani v PP [1970] 2 MLJ 143b; [1969] 1 LNS 12 (refd)

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 AMR 321, FC (refd)

Farose bin Tamure Mohamad Khan v PP and other appeals [2016] 6 MLJ 277; [2016] 9 CLJ 769, FC (folld)

Ghasem Hozouri Hassan v Pendakwa Raya [2018] MLJU 601, FC (not folld)

Gobinathan a/l Valaylam v Pendakwa Raya and another appeal [2018] MLJU 145, CA (folld)

Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)

Mahboob Shah v Emperor AIR 1945 PC 118 (refd)

Mohamad bin Deraman v PP [2011] 3 MLJ 289, CA (refd)

Mohd Yusri bin Mangsor & Anor v PP and another appeal [2014] 4 MLJ 875, CA (refd)

Muniandy & Ors v PP [1966] 1 MLJ 257, FC (refd)

Pendakwa Raya lwn Zakaria bin Mansor [1997] 5 MLJ 505; [1996] 1 LNS 107, HC (refd)

PP v Dato' Seri Anwar bin Ibrahim (No 3) [1999] 2 MLJ 1, HC (refd)

PP v Lim Kiang Chai [2016] 2 MLJ 153, FC (refd)

PP v Lin Lian Chen [1992] 2 MLJ 561; [1992] 4 CLJ 2087, SC (refd)

PP v Ma' Arif [1969] 2 MLJ 65 (refd)

PP v Md Nor bin Hamid [2004] 5 MLJ 97; [2003] 1 LNS 591, HC (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

PP v Wan Razali Kassim [1970] 2 MLJ 79, FC (refd)

PP v Yuvaraj [1969] 2 MLJ 89, PC (refd)

Shamsuddin bin Hassan & Anor v PP [1991] 3 MLJ 314, SC (refd)

Thavanathan a/l Balasubramaniam v PP [1997] 2 MLJ 401; [1997] 3 CLJ 150, SC (refd)

Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Criminal Procedure Code s 173(h)
Evidence Act 1950 s 114(g)
Malaysian Anti-Corruption Commission Act 2009 ss 3, 17, 17(a), 50
Penal Code s 34
Prevention of Corruption Act 1961 (repealed by Anti-Corruption Act 1997) s 14

Alfred Egin (Alfred Egin & Co) for the appellant.
Noor Husnita Mohd Radzi (Deputy Public Prosecutor, Selangor State Legal Advisor's Office) for the respondent.

Ahmad Fairuz JC:

INTRODUCTION

[1] Mohd Farid bin Che Aziz ('the appellant') was found guilty together with Joe bin Stephen ('the first accused') of attempting to obtain RM6,000 from an individual under s 17(a) of the Malaysian Anti-Corruption Commission Act 2009 ('the MACC Act') by the Shah Alam sessions court. The session court judge ('SCJ') sentenced the first accused and the appellant to two years imprisonment. In addition, they were each ordered to pay a fine of RM30,000.

[2] Dissatisfied with the decision of the learned SCJ, the appellant appealed against his conviction and the sentence imposed against him to this court. The first accused did not appeal and went on to serve sentence.

[3] The appeal was heard and dismissed by this court. The appellant now appeals to the Court of Appeal. This is the grounds of judgment of this court.

THE CHARGE

[4] The charge read as follows:

> Bahawa kamu bersama-sama, pada 3.4.2012, jam lebih kurang 4.30 pagi, di tempat letak kereta balai polis Pandamaran dalam Daerah Klang dalam Negeri Selangor, sebagai seorang ejen kepada Polis Diraja Malaysia (PDRM), iaitu Lans Koperal dan Konstabel Ibu Pejabat Polis Daerah Klang Selatan, Cawangan Tugas Am telah secara rasuah cuba untuk memperoleh untuk diri kamu satu suapan, iaitu wang tunai RM6,000.00 daripada Lee Yong Hock, sebagai dorongan bagi melakukan suatu perbuatan berhubungan dengan hal ehwal prinsipal kamu, iaitu melepaskan Lee Yong Hock daripada diambil tindakan bagi kesalahan dikehendaki polis dan memiliki kereta seludup dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 17(a) Akta Suruhanjaya Pencegahan Rasuah Malaysia 2009 dan boleh dihukum di bawah seksyen 24 Akta yang sama dan dibaca bersama seksyen 34 Kanun Keseksaan.

Seksyen 24 ASPRM 2009

24(1) Mana-mana orang yang melakukan kesalahan di bawah seksyen 16, 17, 20, 21, 22 dan 23 apabila disabitkan boleh —

(a) dipenjarakan selama tempoh tidak melebihi dua puluh tahun; dan

(b) didenda tidak kurang daripada lima kali ganda jumlah atau nilai suapan yang menjadi hal perkara kesalahan itu jika suapan itu dapat dinilai atau berbentuk wang, atau sepuluh ribu ringgit, mengikut mana-mana yang lebih tinggi.

THE PROSECUTION'S CASE

[5] During the trial, a total of 17 witnesses were called by the prosecution. It was established from the evidence adduced that in the early hours of 3 April 2012 between 2–3am, Low Kok Leong ('SP2') and Lee Yong Hock ('SP4') who were both in a Nissan Sentra ('the Sentra') was stopped by the first accused and the appellant who were at that time in an unmarked Proton Waja ('the Waja'). SP4 who was the driver of the Sentra had initially tried to evade the police team but eventually were stopped at a dead end. The first accused and the appellant were assisted by a police mobile police vehicle ('MPV') that came to assist. The MPV was manned by *SP1* and *SP8*. SP1 had earlier received a request from the first accused to verify the registration number of the Sentra. However, checks with the system found that the Sentra was not registered with the road transport department ('RTD'). This resulted in the Sentra being pursued by the first accused and the appellant.

[6] After effecting arrest on SP2 and SP4, checks were carried out which showed SP4 was a person on the police 'wanted list'. SP2 and SP4 together with the Sentra were then brought to the Pandamaran Police Station. However, SP2 and SP4 were not brought into the station but instead were kept at the parking area of the station.

[7] SP2 then left with the MPV personnel to buy food as he was hungry. SP4 was left at the station together with the first accused and the appellant. During that time, the first accused had demanded from SP4 RM20,000 for his release. SP4 was unable to accede to the demand but said that he needed to contact a friend to help out. SP4 then called his uncle and gave the telephone to the first accused to speak. The sum was negotiated down to RM6,000. SP4 then was told by his uncle that he was unable to pay RM6,000 as agreed but could only pay RM3,000. RM3,000 was subsequently deposited into SP4's account via online banking.

[8] That morning, the first accused and the appellant brought SP2 and SP4 to several ATM machines at various banks including the ATM machine at the

Public Bank located not far from the Pandamaran Station. There, SP4 handed over his ATM card and PIN number to the first accused. While the money was being withdrawn, the appellant waited in the Sentra with SP2. The first accused and the appellant then brought SP2 and SP4 to several other banks before finally leaving SP2 and SP4 at a cyber cafe in Bukit Tinggi, Klang. Before doing so, the first accused then took the identity cards of both SP2 and SP4. They then drove off in the Sentra. SP4 was asked to bank in the remainder of the RM3,000 into the first accused's account. The first accused gave his account number to SP4 for purposes of depositing the said monies.

[9] After failing to raise the said monies, SP4 decided to lodge a report with the Malaysian Anti-Corruption Commission ('MACC') at the Klang Branch. The report was marked as P2. Acting on the report, the MACC team led by Sabaruddin Baki (SP7), sprang into action. The MACC team prepared for telephone conversations between SP4 and the first accused and the appellant to be recorded. Several conversations were then recorded between the two. A briefing to lay a trap against the suspects was coordinated by SP7. The plan was to wait for the suspects at the Bukit Tinggi Old Town White Coffee Cafe ('the cafe') on the evening of 5 April 2012.

[10] At the appointed time, the MACC team together with SP2 and SP4 waited for the suspects to arrive. The plan was to hand over the marked notes to the suspects. At about 10.10pm, the raiding party together with SP4 saw L/Kpl Mohd Zamrie bin Zulkiflie ('SP11') approaching the Cafe. SP11 was asked by the appellant to look out for a 'lelaki Cina berbadan gemuk dan berkepala botak'. This was how SP4 was described as. As SP11 failed to identify SP4 and went back to the Waja where the appellant was waiting. The appellant then alighted the Waja and together with SP11, walked towards the cafe. On seeing this, SP4 asked SP2 to invite the appellant and SP11 into the cafe. There were hand gestures by SP2 to invite the appellant to discuss the matter inside the cafe. However, the appellant did not want and left the area with SP11. The raid was then called off.

[11] On 26 April 2012, the Sentra was seized from SP11. On the same date, the first accused and the appellant was asked to go to the MACC office in Klang. At about 9pm the same day, a raid was conducted at the residential address of the first accused. The identity cards of SP2 and SP4 were found in a call card casing in the said house.

[12] The first accused was arrested on 11 August 2012 while the appellant was arrested on 12 August 2012. Investigations were carried out by Agusslamin bin Aminuddin ('SP17'). CCTV recordings were obtained from the cafe as well as from several banks. The CCTV recordings showed the presence of the appellant and SP11 in the vicinity of the cafe on the night of the planned raid.

In the recording at the Pandamaran CIMB, a recording showed SP4 and the first accused at the ATM machine. No CCTV recording was available at the Public Bank ATM machine where the monies were withdrawn the said morning as the CCTV was not functioning.

[13] Money trail on the sums involved showed that there was a cash deposit into the account of SP4 totaling RM3,000 at 5.26am on 3 April 2012. Subsequently, there were withdrawals at 5.28am, 5.29am and 5.30am with each withdrawal recording a sum of RM1,000.

[14] During the material time, the first accused and the appellant were police personnel attached to the Pandamaran Police Station and the criminal investigation department respectively.

FINDINGS OF THE TRIAL COURT

[15] The session court judge who presided over the prosecution case acquitted both the accused persons on 20 January 2016. Unfortunately, the said judged passed away before she could prepare her grounds of decision. However upon an appeal, on 14 December 2012 the decision was reversed by the High Court and both the accused persons were ordered to enter their defence. A new SCJ presided over the matter and heard the defence case.

THE DEFENCE CASE

[16] The appellant in his defence, to a certain extent, repeated the story of the first accused. The appellant testified that on 3 April 2012, at about 3am, he was with the first accused carrying out crime prevention patrol around the Pandamaran area in Klang. He was then attached to the task force under the auspices of the Klang Selatan Deputy OCPD. He testified that at around the time mentioned in the charge, he and the first accused saw the Sentra in a suspicious manner in front of some shops in Bayu Tinggi, Klang. As they approached the Sentra, it sped off. This resulted in a chase and eventually, the Sentra was stopped at a dead end somewhere near Taman Chi Liung, Klang. During the chase, they contacted an MPV for assistance and the said MPV and personnel also arrived at the scene where the Sentra was stopped. The appellant said they then conducted a search of the car and also did a background check of SP2 and SP4. One of the persons namely SP4 was listed as a wanted person in the system. The Sentra too, was not listed in the RTD system. The appellant said the car was suspected to have been brought in illegally from Singapore.

[17] The two persons in the Sentra SP2 and SP4 were then handcuffed and were then brought back to the Pandamaran police station. At the station, the appellant and the first accused questioned SP4 whom he addressed as 'Ah

Hock' on how the car came into being. Ah Hock was reluctant to divulge anything as she was afraid to reveal the mastermind of the car syndicate. After much coaxing, Ah Hock agreed to take the two police officers to search for the 'boss' and mastermind behind the car syndicate. Ah Hock then took them to Pandamaran Jaya and Bukit Tinggi searching for the said mastermind up to until 6am when the Waja they were travelling almost ran out of fuel. It was then that the first accused informed that he had to withdraw money from CIMB Bank and they stopped at one of the CIMB banks in the vacinity. The first accused went to the ATM leaving SP2 and SP4 with the appellant. They then went on to search for the said mastermind but to no avail. Ah Hock and SP2 were then released somewhere near Bukit Tinggi. They promised to act as 'tracker' to locate the mastermind.

[18] Several days later, he received a call from the first accused directing him to go to the cafe to pick up documents and to arrest the mastermind. At that particular time, he was with SP11. He asked SP11 to locate the two persons because they do not recognise SP11 but SP11 was unsuccessful. The appellant then went to the five foot way of the cafe and saw Ah Hock. He then asked Ah Hock for the documents to arrest the said mastermind. It was told to him that the documents were not available. He then told Ah Hock to contact him at the Pandamaran police station if there were any developments. He then sat in the car for one hour, observing if the said mastermind would arrive. After one hour, he left the area. On 26 April 2012, he was called by the MACC for his statement to be recorded. The appellant also explained that the Sentra was subsequently used as a 'kereta project' as it was unmarked and was used by other personnel during crime prevention patrols. It was denied by the appellant that he ever attempted to obtain RM6,000 from SP4 to ensure SP4 is let off and that the issue pertaining to the car be closed.

FINDINGS OF THE TRIAL COURT

[19] At the end of the defence case, the SCJ found both the accused persons guilty.

THE APPEAL

[20] Before this court, four main issues were raised by the appellant. It can be summarised as follows:

(a) *failure of the SCJ to fully evaluate the applellant's defence:*
It was contended that the LSJ had failed to fully evaluate the defence of the appellant. This resulted in the SCJ not appreciating the defence. It was contended that, the SCJ had ignored the fact that the appellant was a subordinate to the first accused. While the appellant did not deny being together with the first accused and SP2 and SP4 as

described by the prosecution witnesses, it was argued that he was present at all times because he was on duty with the first accused. Being lower in rank, he was merely obeying instructions. He was not privy to the discussion between SP4 and the first accused. It was argued that the SCJ was wrong in concluding that he went to the cafe to collect the RM3,000 when instead, he was there merely to collect the documents pertaining to the Sentra from SP2 and SP4;

(b) *failure to prove common intention under s 34 of the Penal Code:*
It was argued by the appellant that the prosecution failed to prove common intention. This was because there was no evidence established by the prosecution that the appellant had colluded with the first accused. The fact he was present at all times that morning was due to him being on duty together with the first accused. There was no communication between him and SP4. Therefore there was no pre-arranged plan established and no meeting of minds;

(c) *failure of the SCJ to rule that the presumption under s 50 of the MACC Act had been rebutted:*
It was contended that there was sufficient evidence to rebut the presumption. The fact that the appellant was on duty and that he was not the person who took and kept the identity cards of SP2 and SP4 was sufficient to rebut the presumption. It was argued that the appellant had given an honest explanation in the course of his defence; and

(d) *failure of the SCJ to invoke s 114 illustration (g) of the Evidence Act 1950:*
It was contended that the prosecution should have called the uncle of SP4 who spoke to the first accused on the said morning as he was a crucial witness.

DUTY OF AN APPELLATE COURT

[21] It is an established principle that an appellant court should be slow to interfere with the finding of fact by a lower court as an appellate court does not have the advantage of seeing and hearing the witnesses and therefore of assessing their credibility (see *Public Prosecutor v Wan Razali Kassim* [1970] 2 MLJ 79).

[22] Zawawi Salleh JCA (now FCJ) provided guidance in this area in the Court of Appeal case of *Mohd Yusri bin Mangsor & Anor v Public Prosecutor and another appeal* [2014] 4 MLJ 875 held as follows:

[4] ... We have also scrutinised the records available before us. We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to

which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) SdnBhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149 (CA); *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA)).

[23] Bearing the above guidance in mind, this court proceeded to consider the appeal.

FINDINGS OF THIS COURT

[24] In this current appeal, this court was not privy to the decision of the sessions court judge who acquitted the two accused persons at the end of the prosecution case. It was most unfortunate that the learned sessions court judge had passed away before giving her reasons for acquitting. The High Court in calling for the defence of the two accused persons did so without a written reason.

[25] It is a principle of law that when a case comes before an appellate court, the said matter takes the form of a continuation of a trial and it is open to the appellate court to order or determine if the various findings of the trial court are correct (see *Public Prosecutor v Ma' Arif* [1969] 2 MLJ 65; *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; *Mohamad bin Deraman v Public Prosecutor* [2011] 3 MLJ 289).

[26] As such it is incumbent upon this court to examine the facts presented at the trial to see if there was sufficient evidence established by the prosecution to establish a prima facie case.

WHETHER A PRIMA FACIE CASE HAD BEEN MADE OUT

[27] The duty at the close of the prosecution's case is set out in s 173(h) of the Criminal Procedure Code. The test of what amounts to a prima facie case is well established. Suffice to say that this court will be guided by cases that have, developed the principle. The Federal Court in *Balachandran v Public Prosecutor* [2005] 2 MLJ 301; [2005] 1 AMR 321, Augustine Paul JCA (later FCJ) explained prima facie case as follows at pp 315–316 (MLJ); pp 338–339 (AMR):

> A prima facie case is therefore one that is sufficient for the accused to be called upon to answer. This in turn means that the evidence adduced must be such that it can be overthrown only by evidence in rebuttal ... Since the court, in ruling that a prima facie case has been made out, must be satisfied that the evidence adduced can be overthrown only by evidence in rebuttal it follows that if it is not rebutted it must prevail. Thus if the accused elects to remain silent he must be convicted. The test at the close of the case for the prosecution would therefore be: Is the evidence sufficient to convict the accused if he elects to remain silent? If the answer is in the affirmative then a prima facie case has been made out. This must, as of necessity, require a consideration of the existence of any reasonable doubt in the case for the prosecution. If there is any such doubt there can be no prima facie case.

(See also *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734.)

[28] This court also has a duty to conduct a maximum evaluation of the prosecution's evidence. This includes the assessment of the credibility of witnesses called by the prosecution and drawing inferences from the evidence presented by the prosecution. If the prosecution's evidence admitted two or more inferences, the one that is more favorable to the defence is generally to be accepted unless the silent or circumstantial evidence otherwise discloses a compelling inference that points to the guilt of the accused (see *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457).

Elements of the charge

[29] Section 17 of the MACC Act reads as follows:

> 17 Offence of giving or accepting gratification by agent
>
> A person commits an offence if —
>
> (a) being an agent, he corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or a reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or

A business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;

[30] The elements requiring proof are therefore:

B (i) the appellant is a public officer of the Royal Malaysia Police on duty at the IPD Klang Selatan;

(ii) the appellant as agent attempted to obtain gratification of RM6,000 from his SP4;

C (iii) the appellant attempted to obtain the gratification corruptly; and

(iv) the appellant attempted to obtain the gratification for doing an act in relation to his principal's affairs in this particular case, to not take action against SP4 as a person wanted by the police and SP4 being in possession
D of an unregistered car.

Element (i): An agent

[31] This court is of the view that the prosecution has proven element (i) that
E the appellant was at the material time a public officer attached with the Royal Malaysia Police. This was plainly proven by testimony of DSP Leong Wen Yew ('SP16') the Ketua Bahagian Pengurusan Daerah, IPD Klang Selatan.

Element (ii): Actus reus of attempting to obtain the said monies

F

[32] Element (ii) has been proven by virtue of the facts of the case in particular the evidence of SP2 and SP4. The events that unfolded in the morning of 2 April 2012 sums up the prosecution evidence against the accused persons. It was in evidence that there was a conversation between the first
G accused and the uncle of SP4 that morning. The demand was made for the monies to be paid. This resulted in a partial payment of RM3,000 being deposited in the early hours of 3 April 2012 into the account of SP4. This was clearly shown in the money trail explanation by the CIMB bank officer Lim Cheng Yee ('SP12'). If there was no demand for monies to be paid to the
H accused persons, there was no reason for SP4's uncle to transfer the RM3,000 into the account of SP4. There was therefore, very strong evidence to show that there was an attempt to obtain the demanded sum of RM6,000 albeit only RM3,000 managed to be transferred and withdrawn that morning. The remaining sum was agreed by the accused persons to be banked in when SP4
I was able to raise the said sum.

[33] The numerous recorded telephone conversations (P4A, P4B and P6) from the telephone number registered under the first accused's name and that of SP4's telephone number further points to the irresistible conclusion that

there was a continuous attempt by the accused persons to obtain the agreed sum of RM6,000. The testimony of Muhhamad Husni bin Muhhamad Ramli ('SP5') who was managing the recording of the conversations showed the ongoing discussions right up to the point when the meeting was arranged at the cafe.

[34] It was clearly established by the testimony of SP4 that monies were withdrawn at the ATM on the morning of 2 April 2012 to SP4. This court found that the testimony of SP2 corroborating the evidence of SP4 when he testified he witnessed the monies being divided by the first accused and the appellant that very morning while they were together in the car.

Elements (iii) and (iv): Mens rea of attempting to obtain the monies for corrupt purposes

[35] With the weight of evidence produced before the court, it is the finding of this court that the prosecution is entitled to rely on the presumption under s 50 of the MACC Act. As such, the appellant is presumed to have attempted to obtain the gratification corruptly pursuant to s 50 of the MACC Act. As such, elements (iii) and (iv) are also deem proven by the prosecution unless otherwise explained by the appellant.

[36] It is also an unchallenged fact that SP4 was a person who was wanted by the police. Also, the car that SP4 was driving with SP2 as passenger, was a car that was not registered with the RTD. It had no records. Therefore, it was against the law for anybody to be in possession of such a vehicle. The monies requested were clearly asked as an inducement drop all actions against SP4.

Testimonies of SP2 and SP4

[37] From a perusal of the note of evidence found in the records of appeal, SP2 testified as to what happened on the said morning. Although initially SP2's testimony was rather convoluted, he was however, very clear on the incident pertaining to the elements of the charge. He informed the court that he knew SP4 was trying to contact the latter's uncle to have monies paid into SP4's account. He could explain that the uncle works at a market. He could also remember the amount involved was RM6,000. He knew that the monies requested were eventually banked into the account of SP4. He was certain that the two accused persons had driven him and SP4 around the Pandamaran area that morning. He testified that they went to several banks and mentioned CIMB Bank and Public Bank. He testified that he saw the men dividing the monies in the car after withdrawing from the bank. On the appointed date at

A the cafe, he saw the appellant outside of the shop. He said that he asked the appellant to join them for a drink at the cafe but the appellant refused and then left the vicinity.

B **[38]** SP4 was an assertive witness and could explain very clearly what transpired on the said morning. He testified that he was the complainant to the MACC Report (Klang Report 5/2012) which was marked as P2. He testified that he was told by the policemen who stopped him that he was a 'wanted man' in the police system. He and SP2 were then taken to the Pandamaran police station. At the station, he was told that he could be let off if RM20,000 was C paid. The sum was eventually agreed at RM6,000 after SP4's uncle was contacted. It was agreed that RM3,000 was to be banked in initially. SP4 then told the court that the two accused persons then took them around the area in the Sentra and stopped by several banks to check if the monies were banked in D by the uncle. He was affirmative that the first accused was the person who went out of the car to the ATM machine while the appellant waited in the car. After withdrawing the initial RM3,000, he was asked to provide the remainder of the RM3,000 of the agreed RM6,000 in the afternoon. His identity card (IC) and the Sentra were taken by the first accused. The agreement was for the IC and car E to be returned after the RM3,000 was paid. They were then released somewhere near a CIMB Bank in Bukit Tinggi. After failing to raise the said sum, SP4 went to the MACC office and lodged a report. He was then asked by the MACC officer to contact the first accused to set an appointment to hand over the trap money. It was agreed that it was to be done at the Old Town White F Coffee Cafe. On the appointed time, he saw the appellant arrive at the agreed cafe but refused to go into the cafe. The appellant then left.

Assessment of the credibility of SP2 and SP4

G **[39]** This court examined the notes of proceedings and found that SP2 and SP4 were consistent in their account of the events that unfolded the said morning. This court took the liberty to assess the evidence of the two main witnesses with the rest of the witnesses that were presented by the prosecution. H In particular, this court found the evidence of L/PL Nik Mohd Shahrol ('PW1') corroborating the story of SP2 and SP4 on the events that unfolded that morning. It was clear that the accused persons had taken control of the two 'suspects' and the PW1 had nothing to do after the two main witnesses were left at the Pandamaran police station. Similarly, the evidence of SP11 also I corroborated the story of SP2 and SP4 with respect to the meeting at the cafe. SP11 said that he and the appellant went to the cafe at Bukit Tinggi to meet a friend of the appellant. Coupled with the testimony of the MACC officers, this court is of the firm view that the evidence given by the two main prosecution witnesses remained intact throughout the trial despite the rigorous

cross-examination. The evidence given showed a clear test of their recollection and this court does not find difficulty in making a finding that their credibility remained intact and unscathed.

[40] This court is reminded by the decision of the Federal Court in *Public Prosecutor v Lim Kiang Chai* [2016] 2 MLJ 153 which held that being shaken or unshaken in cross-examination is not per se an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration (see also *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257; *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 79).

[41] It is the finding of this court that the inherent probalility of the two accused persons attempting to obtain the RM6,000 was sufficiently proven based on the testimonies of SP2 and SP4. This vourt has no hesitation to conclude that both SP2 and SP4 were credible witnesses.

[42] The sum total of the above analysis has allowed this court to conclude and find that a prima facie case has been established. The test of whether this court is willing to convict the two accused persons if they remained silent is answered in the affirmative.

WHETHER THE DEFENCE HAD RAISED A DOUBT

[43] The appellant's defence can be summarised as follows:

(a) that he was a subordinate to the first accused. He therefore, had to obey his senior;

(b) that the alleged incident occurred during 'working hours';

(c) that any report to higher authorities has to be made by the first accused;

(d) that the first accused was the person who made the demand;

(e) that the first accused was the person who kept the IC of SP2 and SP4;

(f) that the meeting to meet at the cafe was set by the first accused;

(g) that the reason why he went to the cafe was upon being instructed by the first accused; and

(h) that he only wanted to collect the documents from the SP2 and SP4.

[44] In assessing the defence of the appellant, this court finds that the SCJ did not err in finding that the defence failed to raise any doubt. The SCJ had meticulously sieved through the evidence and compared the strength of the defence with the prosecution evidence. This court is in full agreement with the

SCJ when he said that the appellant's defence of wanting to collect the said documents when he went to the cafe was questionable. If it was true that the appellant was merely collecting the documents, he should have taken some form of action against SP2 and SP4 when they failed to produce the said documents. It would be very odd for suspects of a crime to lead the police on to come all the way to an agreed venue such as the cafe only to be told that the promised documents were actually not available. Further more, it was very strange for the first accused to direct the appellant to arrest the mastermind in such a simplistic manner. If indeed it was for that purpose, surely preparation would have been bigger, rather than an impromptu call to make the said arrest.

[45] What made it even more surprising was the fact that not at any time did the recorded conversations (P4A, P4B and P6) contain any discussion pertaining to the collection of any documents or any discussion about the 'mastermind' or 'boss' being at the café on the agreed day. On the contrary, the phone recordings were discussing about the how and when the balance of the monies could be paid or be made available.

[46] The SCJ was also correct in commenting on the bravado of SP4 in arranging for the meet of the mastermind of the syndicate with the police at the cafe when only a few days before, SP4 was afraid to reveal the identity of the said mastermind.

[47] The SCJ was correct in highlighting that SP11 was not at any time challenged on the purpose of the visit to the cafe. In particular, it was never put to SP11 that both SP11 and the appellant went to the café to arrest the mastermind of the car syndicate. It is trite that it be hooves that defence to state its case as early as possible (see *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561; [1992] 4 CLJ 2087). Failure to cross examine a witness on a material point will have an effect of accepting the version presented by the said witness (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212). In essence, the evidence of SP11 had seriously impacted the defence of the appellant as to the actual intent of going to the cafe on the said evening.

WHETHER THE PRESUMPTION UNDER S 50 OF THE MACC ACT HAS BEEN REBUTTED

[48] Money falls under the definition of gratification under s 3 of the MACC Act. As the RM3,000 was part of the RM6,000 that was supposed to be obtained from SP2 and SP4, and it was proven to have been received by the first accused and the appellant, the presumption that it was received corruptly operates against the appellant.

[49] The MACC Act provides for a presumption. It reads as follows:

50 Presumption in certain offences

(1) Where in any proceedings against any person for an offence under section 16, 17, 18, 20, 21, 22 or 23 it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the gratification shall be presumed to have been corruptly received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, unless the contrary is proved.

[50] Cases on the usage of the presumption have developed albeit on the application of s 14 of the Prevention of Corruption Act 1961, the predecessor to s 50 of the MACC Act.

[51] The standard of proof required to rebut a presumption is on a balance of probabilities. In *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 Lord Diplock held as follows:

Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which if they existed would constitute the offence with which he is charged are 'not proved'. But exceptionally, as in the present case, an enactment creating an offence expressly provide that, if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed, to exist 'unless the contrary is proved'. In such a case the consequence of finding that, that particular fact is 'disproved' will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being 'disproved' there can be no grounds in public policy for requiring that exceptional degree of certainty as exclude all reasonable doubt that, that fact does not exist. In Their Lordships opinion the general rule applies in such a case and it is sufficient, if the court considers that upon the evidence before it, it is more likely than not that, the fact does not exist. The test, is the same as that applied in civil proceedings; the balance of probabilities. This was the test, which was proved by the Court of Criminal Appeal in *R v Carr-Briant* a case upon a provision in an English statute in similar terms to that contained in s 14 of the Malaysian Prevention of Corruption Act 1961.

[52] In *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143b; [1969] 1 LNS 12, Sharma J held as follows:

Once it is prove that the gratification has been paid or received then in the words of s 14 of the Act 'such gratification shall be deemed to have been paid of given or received corruptly ...'. The presumption at once arises under the section.

This presumption is a presumption of law and it is obligatory on the Court to raise it in every proceeding for an offence under s 3 or 4 of the Act provided it is proved that the gratification had been paid, given or received. The prosecution has not to

establish anything more than the payment of money (see *State of Madras v Vaidyanathalyer* and *Emden v State of Uttar Pradesh*). It then becomes the duty of the accused to disprove what s 14 begins to presume against him.

(See also *Public Prosecutor v Md Nor bin Hamid* [2004] 5 MLJ 97; [2003] 1 LNS 591; and *Pendakwa Raya lwn Zakaria bin Mansor* [1997] 5 MLJ 505; [1996] 1 LNS 107).

[53] In the case of *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401; [1997] 3 CLJ 150, the Federal Court approved the application of the presumption as expounded in *Yuvaraj* and *Attan bin Abdul Ghani* and held as follows:

> In any event, in the instant case, once it is proved that the money RM15,000 had been given to or received by the accused the presumption under s 14 of the Act arose that the money had been given and received corruptly as an inducement or reward to acquit and discharge PW2 of the offence in the criminal case. It was then for the accused to give an innocent explanation which the court considered more likely than not that it was true.

[54] Counsel for the appellant argued that the SCJ erred when he failed to rule that the said presumption had been rebutted by the appellant. Therefore, there must be a conscious evaluation by this court to determine if the appellant had succeeded in so rebutting the said presumption.

[55] It was difficult for this court to find any evidence put forward by the appellant to rebut the said presumption. It was in evidence that the appellant was at all material times together with the first accused as well as during discussions regarding payment of monies between SP4 and his uncle. The appellant was at all times too, guarding SP2 and SP4 that morning until they were released at around 7am.

[56] The prosecution evidence also showed that there were monies being withdrawn from the CIMB Bank automated teller machine. Not only did SP2 and SP4 explain this, the independent evidence from the CIMB bank officer SP12 who testified that there were records (P9) to show that monies amounting to RM3,000 was deposited into the account of SP4 at about 5.26am on 3 April 2012. The said sum was withdrawn in three transactions of RM1,000 each on that very morning at 5.28am, 5.29am and 5.30am. This materially, corroborates the story of the SP2 and SP4.

[57] The time in which the monies were withdrawn coincided with the time when both SP2 and SP4 were under the custody of the first accused and the appellant. It is on the strength of the evidence of the prosecution that this court

finds that the appellant had failed to rebut the statutory presumption. There was corrupt intention by both the first accused and the appellant.

WHETHER COMMON INTENTION S 34 OF THE PENAL CODE WAS PROVEN BY THE PROSECUTION

[58] Common intention is concerned with the principle of joint liability in penal law. The appellant argued that the prosecution had failed to prove common intention between the first accused and the appellant. As mentioned above, the defence of the appellant was that he was at all material times, under the instructions of the first accused. He was not the person who negotiated with the uncle of SP4. He was not the person who kept the identity cards of SP2 and SP4. He was not involved in setting up the meeting at the cafe. The constellation of these factors according to the appellant, had clearly shown that there was no common intention proven by the prosecution.

[59] The law on s 34 is well established. *(1) Namasiyiam (2) Rajindran (3) Goh Chin Peng, and (4) Ng Ah Kiat v Public Prosecutor* [1987] 2 MLJ 336 is *locus classicus* that established the principle of a prior meeting of minds presupposes some concert between the actors of the crime (see also *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314; *Mahboob Shah v Emperor* AIR 1945 PC 118).

[60] In the Federal Court case of *Farose bin Tamure Mohamad Khan v Public Prosecutor and other appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769, Raus Sharif PCA (then CJ) held as follows:

> [65] ... we still hold the view which had been widely accepted by our courts that in a criminal prosecution where s 34 of the Penal Code is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. As long as there is a common intention to commit a criminal act, which resulted to the commission of a crime actually committed, s 34 can operate against all persons involved in the commission of the actual crime.
>
> [66] *The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Direct evidence as proof is difficult to procure because the common intention is essentially a state of mind.* Invariably inferences have to rely upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them or such other relevant circumstances available. *The totality of the circumstances must be taken into consideration in arriving at a conclusion whether there is a common intention to commit the offence for which the accused could be convicted.* The facts and circumstances of each case might vary. As such, each case should be decided based on the facts involved.
>
> ...

A [70] *Simply put, common intention is concerned with the principle of joint liability in penal law*. This principle has been set out in numerous judgments in our jurisdiction. In *Krishna Rao*, the appellants were charged for the murder of four persons in the course of robbery of a jewellery shop. In the High Court, Kang Hwee Gee J (as he then was) in convicting the appellants, quoted the law on common B intention expressed by the Singapore Court of Appeal in the case of *Shaiful Edham bin Adam & Anor v Public Prosecutor* [1999] 2 SLR 57 in the following words:

> 1. ...
>
> 2. all that was necessary for the prosecution to prove was that there was in C existence a common intention between all the persons involved to commit a criminal act and that the act which constituted the offence charged (the 'criminal act' referred to in s 34 of the Penal Code) was committed in furtherance of that criminal act. It was not necessary to prove that there had to be a common intention to commit the crime actually committed;
>
> D 3. the rider to this proposition was that the participants must have had some knowledge that an act may be committed which would be consistent with or in furtherance of, the common intention;
>
> ...

E [74] *The Federal Court further held that the Court of Appeal was wrong in looking for a direct link to who actually amongst the respondents who committed the act or acts in killing the deceased. The Court of Appeal's approach according to the Federal Court was not quite in tandem with settled law that is when s 34 of the Code is invoked, there is no requirement for the prosecution to prove who exactly ultimately caused the deceased's* F *death. The Singapore case of Ong Chee Hoe v Public Prosecutor* [1999] 4 SLR 688 *was cited with approval.*

[75] From the above cases, we are of the view that the law on the operation of s 34 of the Penal Code is well settled. We have no reason to depart from this established principles on common intention. *As stated earlier, the existence of a common intention* G *is a question of fact of each of the case to be proved as a matter of inference from the circumstances of the case.* (Emphasis added.)

[61] The above decision was relied upon by the Court of Appeal in *Gobinathan a/l Valaylam v Pendakwa Raya and another appeal* [2018] MLJU H 145.

[62] Applying the above principles to the case before this court, it is very clear that it matters not that the appellant did not negotiate the sum in question. It matters not too that the identity card was held by the first accused. I What was crucial for s 34 to be proven is whether there was participation by the appellant which culminated in criminal act. In this matter, the attempt to obtain the RM6,000.

[63] As discussed above, there was clear participation by the appellant

together with the first accused that can readily infer common intention between them. Not only that he was at all material times with the first accused, he was also ensuring the criminal enterprise was completed. It was the appellant who eventually went to the cafe to conclude the agreed deal. He was also involved in the handling of the Sentra when he directed SP11 to take delivery of the car to be kept at the latter's house. Merely pleading that he was a subordinate to the first accused does not exonerate him from liability.

[64] The conduct of the appellant after the event too, shows that the appellant really had every opportunity to detach himself from the criminal activity. However, he chose to allow the first accused to further the act of soliciting the said sums from SP2 and SP4. In short, there was nothing that can be shown by the appellant that he took any steps to report or escalate the issue further to his superiors. He did not even record the incident in his pocket book.

[65] The failure to do all the basic actions points conclusively to the appellant being a party to the criminal enterprise. It is the firm finding of this court that common intention was clearly present between the first accused and the appellant at all material times.

WHETHER S 114 ILLUSTRATION (g) OF THE EVIDENCE ACT 1950 (S 114(g)) SHOULD BE INVOKED AGAINST THE PROSECUTION

[66] Counsel for the appellant argued that s 114(g) should be invoked against the prosecution for failing to call the uncle of SP4 who spoke to the first accused on the said morning.

[67] The Federal Court in the recent case of *Ghasem Hozouri Hassan v Pendakwa Raya* [2018] MLJU 601 Raus CJ speaking for the Federal Court outlined the applicability of s 114(g). His Lordship held as follows:

> [48] The law pertaining to s 114(g) of the Evidence Act is settled. Under s 114(g) of the Evidence Act the court may presume that evidence which could be and is not produced would if produced be unfavorable to the person who withholds it. *The usage of the word 'may' gives the discretion to the court whether or not to invoke the adverse inference to a given set of facts. It is not a mandatory inference. To draw an adverse inference against the prosecution the court must be satisfied that the witness that was not offered was a material witness, the prosecution purposely withhold evidence which it possessed and which was always available; and that what the prosecution did was done with an ulterior motive to frustrate the defence*' (*Nanda Kumar a/l Kunyikanan & Anor v Public Prosecutor* [2011] MLJU 1566; [2011] 8 CLJ 406).
>
> [49] The aforesaid authority above set out is the correct position of the law, that is, *court will not invoke an adverse inference against prosecution if it believes that the facts and/or the prosecution's reasons for not calling the supposed material witnesses show no cause for it. Moreover, the prosecution only needs to produce witnesses who are necessary*

in the unfolding of its complete narrative, that is, to prove the essential elements of the crime and in this case, custody, control, and knowledge. Applying the above principles to our present case, we are satisfied that there was no evidence to suggest even the slightest inkling that the prosecution withheld testimonies by Javad @ Hasan Tiren and Samaneh Momen in a deliberate scheme to impair the truth or frustrate the appellant's defence.

[50] Further, in the case of *Siew Yoke Keong v PP* this court had succinctly laid down that witnesses for prosecution are indispensable only insofar as they are necessary in establishing a prosecution's case beyond a reasonable doubt. *Thus, any calling of witness beyond that minimum requirement is within prosecutorial discretion. In the end, it is the sufficiency of the evidence that matters. As long as there are no 'unsatisfactory features or gaps in the prosecution's case, an order of adverse inference is not imperative.* It is our view, on the facts of this case, adverse inference under s 114(g) of the Evidence Act, could not be invoked against the prosecution. (Emphasis added.)

[68] It is the finding of this court that the failure to call the uncle of SP4 did not at any time result in any gap to the prosecution case. The uncle was not a material witness to prove the act of attempting to obtain the said monies. Although there was a conversation with the said uncle that morning, the rest of the events that unfolded between the first accused, appellant and the two main witnesses had sufficiently unfolded the narrative of the prosecution case. There were no unsatisfactory gaps in the prosecution case.

[69] This court also did not find any oblique motive on the part of the prosecution for not calling the said uncle. Even without his evidence, it was shown how the first accused and the appellant went about in attempting to obtain the said RM6,000. As such, there was no basis to invoke s 114(g) against the prosecution as guided by *Ghasem Hozouri Hassan v Pendakwa Raya*.

OTHER EVIDENCE BEFORE THIS COURT

[70] Apart from the evidence of the two main witnesses, it is a finding of this court that there were independent evidence produced by the prosecution that went on to strengthen the case for the prosecution. The tape recordings marked as P4A, P4B, and P6 were admitted in accordance with the prevailing law. The court had every right to rely on the said recordings and transcript.

SENTENCE

[71] This court does not wish to alter the sentence imposed by the SCJ as neither was the sentence grossly inadequate or was it manifestly excessive or unsuitable to the proved facts and circumstances. It was passed according to law. The prosecution too, did not appeal against it.

CONCLUSION

[72] Based on the above analysis, this court does not find any reason to disagree with the findings of the SCJ. In the upshot, the appeal is dismissed and the conviction and sentence is affirmed.

Appeal dismissed; conviction and sentence affirmed.

Reported by Mohd Kamarul Anwar